

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'F', MUMBAI**

**BEFORE SHRI D.K. AGARWAL, JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER**

I.T.A. NO. 6997/M/2011
ASSESSMENT YEAR:2008-2009

M/s. Urudavan Investment & Trading P. Ltd., 209-210, Arcadia Building, 195 Nariman Point, Mumbai – 400 021. PAN: AAACU1353N	Vs.	Addl. Commissioner of Income Tax, Range 2(3), Aayakar Bhavan, Mumbai – 400 020.
(Appellant)		(Respondent)

I.T.A. NO. 7442/M/2011
ASSESSMENT YEAR:2008-2009

Addl. Commissioner of Income Tax, Range 2(3), Aayakar Bhavan, Mumbai – 400 020.	Vs.	M/s. Urudavan Investment & Trading P. Ltd., 209-210, Arcadia Building, 195 Nariman Point, Mumbai – 400 021. PAN: AAACU1353N
(Appellant)		(Respondent)

Assessee by	:	Shri Vijay Mehta
Revenue by	:	Shri Om Prakash Meena

Date of Hearing: 18.10.2012

Date of order: 5 .12.2012

ORDER

Per D. KARUNAKARA RAO, AM:

These are cross appeals filed against the order of CIT (A)-6, Mumbai dated 30.08.2011 in relation to assessment year 2008-2009. Grounds raised in both the appeals are as under:

2. Grounds raised in Revenue's appeal - I.T.A. NO. 7442/M/2011:

- "1. *The order of the CIT (A) is opposed to law and facts of the case.*
2. 1(A) *"On the facts and circumstances of the case and in law, the Ld CIT (A) erred in **treating the short term capital loss as business loss** without appreciating facts and findings brought on record byAO.*
1(B) *"On the facts and circumstances of the case and in law, the Ld CIT (A) failed to appreciate that the ratio of decision in the case of **Gopal Purohit** [336 ITR 287 (Bom.)] is squarely applicable to this*

case as the assessee took delivery of units of mutual funds and sold it at later date after availing the dividend therefrom”.

1(C) "On the facts and circumstances of the case and in law, the Ld CIT (A) failed to appreciate that the purchase and sale of mutual funds was short term capital gain but the assessee treated it as business activity to avail the benefit of loss which otherwise would not have been available as otherwise there was no short term capital gain available for set off."

1(D) "On the facts and circumstances of the case and in law, the Ld CIT (A) failed to appreciate the colourable planning of the assessee to evade tax on the business income by wrongly setting off the short term capital loss in guise of business loss."

3. 2(A) "On the facts and circumstances of the case and in law, the Ld CIT (A) failed to appreciate that the assessee has **claimed loss on open position F&O contract** and **did not offer the profit for tax** on similar open position of F&O contract on the last day of the previous year."

2(B) On the facts and circumstances of the case and in law, the Ld CIT (A) failed to appreciate the **ratio of decision in the case of Woodward Governors Pvt. Ltd.** [179 Taxman 326 (SC)] wherein it was held that the notional loss or gain at the end of the year is to be treated as expenses or gain resp. of the year and therefore, erred in deleting the addition of Rs. 2,50,32,898/- on account of open position of F&O contract as on 31st March, 2008."

4. For these and other grounds that may be urged at the time of hearing, the decision of CIT (A) may be set aside and that of AO restored."

3. Grounds raised in **Assessee's** appeal: *The only effective ground raised by the assessee reads as under:*

*" On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in confirming the addition of Rs. **1,56,23,811/-** made by the AO under section **14A** r.w. Rule-8D of the Income Tax Act, 1961. The appellant prays that the same may please be deleted."*

4. Briefly stated the relevant facts of the case are that the assessee who has claimed to have engaged in the business of trading and investment, filed the return declaring the business **loss** of Rs. 21,78,14,379/-. The return was scrutinized u/s 143(3) of the Act and the total income was determined at Rs. 24,21,09,160/-. In the return, the assessee claimed **business loss** on sale of shares to the tune of Rs. 42,01,31,205/-. Considering the fact that the said loss is in the nature of short term capital loss, AO assessed the same as **short term capital loss** instead of business loss. During the assessment proceedings, AO noted that the assessee invested (a) a sum of Rs 13 cr in Index Select Fund on 10.10.2007; (b) Rs 15 cr in UTI Nifty Index

Fund on 24.12.2007; and (c) Rs 50 cr UTI Nifty Index Fund on 24.12.2007 totaling to Rs 78 cr. Subsequently, the assessee earned dividend income out of these units amounting Rs 30,82,83,539/- in the months of Jan and March 2008. Finally the assessee sold all these units on 17th Jan and 28th March, 2008. As a result of the redemption of the units, the assessee incurred the loss of Rs 42,01,31,205/-. While the assessee claims the same as the business loss in view of the treatment of stock in trade in the books over the years as well as their volume of turnover, the AO held the same as 'short term capital loss' in view of mere three transactions of purchase and sale together with the colourable device allegedly resorted to by the assessee. Of course there are other related issues involving dividend stripping allegations and we will not discuss them here as these issues are not agitated by either parties before us.

5. Further, the AO picked up the profits and losses declared by the assessee involving the Futures and Options for scrutiny. AO found that the assessee earned and declared profit of Rs. 17,36,09,327/- for the year on transactions relating to Futures & Options (F&O). He also declared the loss on account of ten scrips to the tune of Rs. 3,34,00,286 in the year. However, a sum of Rs 2,50,32,898/- was earned out of the Cent tax and not offered for tax in the year. On finding that the assessee did not recognize profit of Rs. 2,50,32,898/- as income of the year, AO recognized the same as profit of the assessee in the year under consideration. Otherwise, it is a fact that the assessee offered the same in the next financial year i.e AY 2009-2010. In response, AO rejected the written submissions filed by the assessee. Thus, the addition on this account is Rs. 2,50,32,898/- as profits on outstanding possession in Futures.

6. Further also, AO also made disallowance by invoking the provisions of section 14A of the Act. On finding that assessee earned dividend income of Rs. 31,27,95,594/- (short term and long term units) which was claimed as exemption u/s 10(34), AO proposed to invoke provision of section 14A read with Rule-8D of the Act and he relied on the judgment of jurisdictional High Court in the case of Godrej

& Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81. On this account, AO made **addition of Rs. 1,56,23,811/-**.

BEFORE THE CIT(A):

7. Aggrieved with the above additions, the assessee filed appeal before the CIT(A) and the assessee made various submissions which are extracted in para 1.2 of the impugned order. On the issue of AO's decision in treating the business loss of Rs 43,01,31,205/- as the short capital gains loss, the case of the revenue is that the same cannot be the business loss for the following reasons,- (a) number of transactions are not many – three transactions only; (b) intention was to earn the dividends – evidenced by the fact the assessee earned dividend of Rs 30.82 cr (rounded off) as per the table below;

S.No	Scrip	Date of purchase	Units purchased	Amount of purchase	Date of dividend	Amount of dividend	Date of Sale	No. of days
1	Index Select Fund	10.10.2007	42,86,185,295	13,00,00,000	14.1.2008	5,14,34,224	17.1.2008	97
2.	UTI Nifty Index Fund	24.12.2007	39,51,527,924	15,00,00,000	25.3.2008	5,92,72,919	28.3.2008	93
3.	UTI Nifty Index Fund	24.12.2007	1,31,71,759,747	50,00,00,000	25.3.2008	19,75,76,396	28.3.2008	93
				78,00,00,000		30,82,83,539		

(c) scrips only two in number ie Index Select Fund and UTI Nifty Index Fund; (d) assessee employed huge capital of Rs. 78 crores etc. On the other hand, the case of the assessee is discussed by the CIT(A) in para 1.2 of his order. Briefly the contents are that the relevant books entries shows that the units are shown as stock-in-trade, the funds for investment is out of the loans, delivery based units and they are purchased and sold in normal course of business, the judgments relied upon by the AO are inapplicable to the assessee's case; maximization of the profits is the one of facets of the business activity, applicability of the SB decision in the case of Wallfort Shares and Stock Brokers P Ltd to support to the claim of the assessee; intention of the assessee is paramount and the three transactions cannot merely makes the transactions non business activity in nature; principle of consistency in matters of declaring the gains or loss on the sale of units as the business loss/gains and not as short term capital loss or gains; applicability of the binding Judgment in the case of Gopal Purohit 336 ITR 287 etc.

8. On consideration of the submissions of the assessee, CIT(A) upheld the views of the assessee and held that the loss of Rs 43,01,31,205/- is the business loss and not the short term capital loss as held by the AO. Relevant discussion is in para 1.3 and gist of the same is given here. CIT(A) held that the case of the assessee does not fall in the category of 'colorable device' and relied on the CBDT circular to hold that the investor has option to do both investor and trader of the units/shares. CIT(A) relied on the books entries of the units held as stock, while mentioning that the same is not conclusive. He also discussed the aspects of applicability of res judicata to the income tax proceedings in the light of the Hon'ble Supreme Court's judgment in the case of Radhasoami Satsang 193 ITR 321. Further, the CIT(A) commented that the department has accepted the assessee dealing in units as the business activity and loss thereof is business loss. As per the CIT(A), AO is not correct in disturbing the stand of the assessee in this regard. He also observed that the assessee loans have swollen to Rs. 270.29 cr at the end of March 2008 as against Rs. 70.31 cr at the end of March 2007. Finally, the CIT(A) granted relief to the assessee on this issue of business loss.

BEFORE ITAT:

9. Aggrieved with the same the revenue is in appeal before us. Ground 2 is relevant here and it has four sub grounds. In these sub grounds, the revenue argues that the CIT(A) erred in treating the said loss as business loss. Revenue is of the view that the ratio of judgment in the case of *Gopal Purohit*, (supra). Further, the revenue opines that the assessee treated the said loss as business loss only with the intention to set off the same against the business profits of the assessee, who end up paying no taxes despite earning of huge taxable income. Revenue views that the CIT(A) erred in not seeing the colorable device resorted to by the assessee causing loss to the revenue. Otherwise, Ld DR relied on the order of the AO on this issue. Referring to the order of the CIT(A), Ld DR mentioned that the principle of *res judicata* does not apply to tax matters and every assessment year is different for tax purposes as held by the Apex court in the case of *Radhasyam Santsoang*, (supra)

only exception to the rule are the cases covered by the Supreme court judgment in the case of *Gopal Purohit* (supra), which is relevant for the rule of *consistency*. On the rule of consistency, Ld DR mentioned that the facts and legal position is different for the AY under consideration. For example, DR informed us of the amended provisions of section 94(7) of the Act relating to dividend / bonus stripping and the restriction of 90 days provided in the Act. This restriction has not existed for the earlier AYs. On facts also, Ld DR mentioned that no authority has examined the facts of the current year with that of the earlier years and in such circumstances, it is not correct to pass judgment on the applicable rule of consistency.

10. *Per contra*, Ld AR for the revenue explained the facts relating the issue under consideration and mentioned that the loss in question constitutes a business loss of the assessee which should be available for set off against the business income of the assessee. Sri Vijay Mehta, Ld Counsel for the assessee argued vehemently on the applicable '*rule of consistency*' in the light of the apex court's judgment in the case of *Gopal Purohit* (supra). In this regard, Ld Counsel filed a copy of the order of the Tribunal which decided the issues of valuation of stock of bonus MF units in connection with the review order passed by the CIT u/s 263 of the Act. It is the argument of Sri Mehta that the Tribunal has not disturbed the case of the assessee ie stock of units of MF is the business stock and the case of investment. In this regard, para 12 and 14 on page 10 of the order of the Tribunal was read to demonstrate the same. Next drawing our attention to the applicable principle of '*res judicata*', Sri Mehta mentioned that so long as the facts are identical, this principle has no application and rule of consistency needs to be followed. Ld Counsel relied on the jurisdictional high Court's judgment in the case of *Darius Pandole* reported in 330 ITR 485. When the facts are identical, change of opinion of the AO is unwarranted. In this regard, Ld Counsel relied on the book entries consistently followed treating the units as stock in trade. Fairly, Sri Mehta also brought to our notice the fact of absence of provisions relating to dividend/bonus stripping in section 94 of the Act. These provisions are brought into statute by the Finance Act 2001 which are subsequently amended by the Finance (no 2) Act, 2004.

11. Further, mentioning about the various facets of the investment or business transactions, Sri Mehta mentioned that the borrowing of funds as done by the assessee for acquiring of the units of MFs is an important feature of business activity. He recalled the fact of investing a sum of Rs. 78 cr and registering the turnover of more than 8 times of the same suggests the business nature of the transaction. Books entries showing the impugned transaction as stock in trade is over emphasized by the assessee. He fairly mentioned that the books entries are not conclusive. Assessee's counsel also relied on the judgment in the case of *Walfort shares and stock Brokers P Ltd* (supra) for the proposition that impugned transactions should be viewed as 'business transactions'. In this regard, Sri Mehta filed a written submission summing up the arguments. Sri Mehta also took objection to the AO's allegation relating to the colourable device resorted to by the assessee.

12. We have heard both the parties in the litigation. On the issue of capital loss or business, in our opinion, there is no dispute between the parties on the facts of the year. Further, there is no dispute on the existence of the principle of 'rule of consistency' as well as on the principle of 'res judicata'. However, the important question to be answered by both the parties relates identical nature of the facts among the years of comparison for consistency rule and the other principle of *res judicata* on the issue. In this regard, we have searched for the facts for comparison among the AYs from the records available before us. Although neither of the lower authorities have done any comparison of facts, we have attempted to cull out facts for relevant comparison from the orders or the material on records available before us. We wanted to see if the number of scrips and transaction in earlier years are also two and three respectively as in the instant year. We also wanted to examine if the facts relating to volume/turnover, volume of the borrowed capital, sales-purchase ratios, dividend earning particulars etc are comparable and if the nature of stock of MFs purchased in all the years under the consideration is identical or comparable at least. There are no details on these areas of comparison. It is a settled position that for applying the principle of *res judicata* as well as the rule consistency, the facts become relevant and the orders of AO/CIT(A) do not contain

any whispers on this important aspect. The judgment of Honble High court of Bombay in the case of [CIT vs. Gopal Purohit](#) 228 CTR 582 (Bom) has set certain guidelines to determine whether shares gains assessable as STCG or business profits. They are :

- "(a) it was open to an assessee to maintain two separate portfolios, one relating to investment and another relating to business of dealing in shares,*
- (b) that a finding of fact had been arrived at by the Tribunal as regards the two distinct types of transactions namely, those by way of investment and those for the purposes of business,*
- (c) that there should be uniformity in treatment and consistency when **facts** and **circumstances** are identical particularly in the case of the assessee and*
- (d) that **entries in books of account alone are not conclusive** in determining the nature of income though they have a limited role to play."*

13. The conclusion portion of the said judgment in the case of Gopal Purohit, supra reads that *'Tribunal having entered a pure finding of fact that the assessee is engaged in two different types of transactions namely , investment in shares and dealing in shares for the purposes of business and held that the delivery based transactions are to be treated as investment transactions and the profit received there from is to be treated as ST or LT capital gains depending on the period of holding of shares and that **there ought to be uniformity in treatment and consistency in various years** when the **facts and circumstances are identical no substantial question of law arises.'***

14. From the above it is evident that apart from the facts, the 'circumstances' are also equally relevant in matters of applying the 'rule of consistency' *qua* the issue relating to the principle of '*res judicata*'. On this issue, there is need for furnishing of related facts by the assessee and the revenue authorities need to give finding on the same. The expression 'circumstances' may refer to comparability of applicable law, tax rates, loss –profits issues, relevance of provisions relating to dividend stripping issues etc. The comparison for treatment and consistency must involve the data of many years. In our opinion, impugned order of the CIT(A) is inadequate and

contains blanket conclusions on principle of consistency and res judicata without bringing facts of many years on to the records. In that sense, the order of the CIT(A) can't be categorized as a speaking one in the matter.

15. Thus there is need for facts of many years relevant to issue and available data is scanty. In the light of the above essential requirements, we find the data on facts and the circumstances are inadequate. In such circumstances, for want of relevant facts for many years essential for comparison on facts relating to the impugned transactions such as volume, turnover, number of transactions, scrip details, entries in the books of accounts etc on one side and comparative data on circumstances relating to tax rate, legal provisions as amended from time to time particularly with regard to the provisions of section 94 of the Act, set off of loss with profits etc, in our considered opinion, the issues raised in these grounds of the revenue must be set aside. It is an undisputed fact that the dividend stripping provisions have been brought into statute in the year 2002 and amended subsequently in the year 2005 and it may contribute against the rule of consistency in matters relating to the "circumstances" discussed above. Of course, the arguments of Ld Counsel relating to entries in the books of account as stock in trade consistently may likely go in favour of the assessee. Unfortunately, the fact relating to entries is one of the many parameters set for concluding if a transactions is of business nature or otherwise. Further, Ld Counsel's reliance on the order of the Tribunal on the validity of CIT's order u/s 263 of the Act, in our opinion, is misplaced as the issue in the review order relates to the **valuation** of the bonus units of MFs and not on if the units are held as stock in trade or investments. Then the issues adjudicated in the case of Wallfort Share and Stock Brokers P Ltd (96 ITD 1) (SB) relates to the AYs 2000-01 and 2001-2002 ie prior to the amendment to section 94 of the Act and that means there is change in the legal frame work/ 'circumstances'. Further, it is also relevant to mention that the assessee claims that he holds the units/shares both as stock in trade and partly as investments and he can rightly hold so. Computation chart depicts the relevant details of business income/loss and the capital gains/loss. AO needs to examine the basis on which the entries are made by

the assessee in the books. On the facts of the disclosure of profits partly as business income and partly as short term capital gains, Hon ble AP High Court held in the case of *PVS Raju* 340 ITR 75 that the gains are assessable as business profits. Hon'ble High Court in the said case observed that when the frequency of transactions are high and the dominant intention in purchase of share is resale and not for earning of the dividend, the profits has the flavor of business profits and not short term capital gains. But the fact of the present case is that the frequency & number of transactions are undisputedly too low, earning of dividend appears to be a dominant intention in acquisition of the two units of MFs, obviously the scrips are few, figures appear of high value, it does not appear that the assessee has the intention of holding on to the units as investment, the conduct of the assessee in dealing with the shares over the years is also relevant factor and adequate facts for determining the same are not brought on to the records etc. Therefore, no single criterion shall decide the issue on hand ie if the units of two MFs ie (UTI select fund & UTI Nifty index fund) purchased by the assessee in Oct/Dec 2007 for Rs. 78 cr (out of which the borrowed funds are Rs 42.25 cr) and sold in Jan/March 2008 ie after 90 days of holding and after earning dividend of Rs 30,82,83,539/-, for the loss of Rs 42,01,31,205/- are to be held as stock in trade or as investments?. In any case, we keep all the issues/question open and direct them to the AO for fresh examination and decision in the set aside assessment. In the set aside proceedings before the AO, the assessee is required to file adequate data for establishing the claim. AO is directed to admit evidences or additional evidences that may help for substantiating the claims. AO shall grant reasonable opportunity of being heard the assessee. Accordingly, the ground 2 which contains four sub-grounds is **set aside**.

16. **Ground 3** relates to non offering of certain profits in the year under consideration. The case of the AO is that the assessee, in matters of F&O, when debited the notional loss, should have credited the notional gains/profits to the P & L account and made an addition of Rs. 2,50,32,898/-. CIT(A) deleted the addition relying on the order of the Tribunal of Mumbai Bench in the case of Edelweiss Capital Ltd vide ITA NO 5324/M/2007 dt 10.11.2010. Aggrieved with the said order of the CIT(A), the revenue is in appeal before us. Vide the grounds, the Revenue is

of the opinion that the CIT (A) failed to appreciate that the assessee has claimed loss on open position of F&O contract and **did not offer the profit** of Rs. 2,50,32,898/- for taxing on similar open position of F&O contract on the last day of the previous year. We have discussed relevant facts in the preceding paragraphs of this order and mentioned that AO analyzed the profits and losses declared by the assessee involving the Futures and Options. AO noticed that a sum of Rs 2,50,32,898/- was earned out of the Cent tax and not offered the said profits for tax in this year. On finding that the assessee did not recognize profit of Rs. 2,50,32,898/- as income of the year, AO recognized the same as profit of the assessee in the year under consideration. Assessee submitted that the said profits were offered to tax in the next financial year i.e AY 2009-2010 based on the principle of fact of realization of profits. Whereas the loss was debited to the P and L account based on the approved principle of Prudence. Apex court's judgment in the case of Chainrup sampatram report in 24 ITR 481 is relevant, which was followed by the Bombay Bench Tribunal in the case of Edelweiss Securities Ltd supra its order dated 28.3.2012. Aggrieved with the said order of the CIT(A), revenue is before us with ground 3.

17. During the proceedings before us, Ld Counsel submitted that the said ground of the revenue has to be dismissed in the light of the decision of the Tribunal in the case of Edelweiss Capital Ltd vide ITA No. 5324/M/2007 for the proposition that the anticipated profits involving futures and options in the shape of the appreciated value of the stock is not brought into books unless they are realized. Relevant portion of the said decision (page 6 and para7) is reproduced as under:

"We have considered the facts and.....There is no dispute that the assessee holds the derivatives as its stock-in-trade and there is also no dispute that it follows the principle "cost or market price, whichever is lower" in valuing derivatives. When derivatives are held as stock-in-trade then whatever rules apply to the valuation of stock-in-trade will have to be necessarily apply to their valuation also. It is well settled position in law that "while anticipated profit in the shape of appreciated value of the closing stock is not brought into the account, as no prudent trader would care to show increased profit before its realization..... it is to the assessee's strength that the Institute of Chartered Accountants of India in its guidelines have also approved of the rule of prudence which really means that while

M/s. Urudavan Investment & Trading P. Ltd

anticipated losses can be taken note of while valuing the closing stock, anticipated profits cannot be recognized. The anticipated loss, in the light of the judgment of the Supreme Court cited above, cannot be treated as a contingent liability.”

18. As per Ld Counsel for assessee, the anticipated profits are notional profits in this year and are realized in the next year and therefore, they are taxable in the next year. Therefore, as per Sri Mehta, the addition made by the AO is rightly deleted by the CIT(A). On the other hand, Ld DR for the revenue could not demonstrate if the profits are realized in this year. Further, he could not file any contrary decisions to prove that the decision of the Tribunal in the case of Edelweiss Capital Ltd, (supra) is not correct law. It is a settled law that the accounting principles, which are applicable to the any stock in trade is equally applicable to the open positions of F&O. Therefore, we are of the firm view that the notional loss is allowable as long as there are no contingencies are attached and the notional gains should be allowed in the year of realization based on the principle of prudence. The question is what if there is difference between the anticipated profits quantified in an year and the actual profits realized thereafter. On finding that there is no dispute on the fact that the appreciated value of stocks is realized and afforded to tax in the next year. Therefore, in our opinion, the order of the CIT(A) on this issue does not call for any interference. Accordingly, the ground 3 is **dismissed**.

19. Grounds 1 and 4 are general and they do not call for specific adjudication.

20. In the result, the appeal of the revenue is partly allowed for statistical purpose.

I.T.A. NO. 6997/M/2011 (Assessee's appeal)

21. The solitary ground raised by the assessee in its appeal read as follows.

*" On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in confirming the addition of Rs. **1,56,23,811/-** made by the AO under section **14A** r.w. Rule-8D of the Income Tax Act, 1961. The appellant prays that the same may please be deleted."*

22. Briefly stated relevant facts on this issue are that the assessee huge amount of earned dividend income and claimed exemption in view of the provisions of section 10(34). During the assessment proceedings, AO proposed to invoke provision of section 14A of the Act read with Rule-8D of I T Rules 1962. AO also he relied on the judgment of jurisdictional High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81. Finally, AO made **addition of Rs. 1,56,23,811/-** u/s 14A of the Act. The direct and indirect expenditure disallowed are Rs 1,42,61,014 and 12,14,079 respectively. Other expenditure disallowed is Rs 1,48,718/-. CIT(A) upheld the disallowance. Aggrieved with the above findings of the CIT (A), assessee filed the present appeal with the solitary issue mentioned above. During the proceedings, Ld Counsel mentioned that the issue in question is contingent on the outcome of the appeal vide the ground 2 of the revenue's appeal. The issues essentially relate to the quantification of the disallowance u/s 14A of the Act and reckoning of units of MF as stock in trade and not as investment shall matter for such quantification issues. If the assessee's stand is approved, stock in trade needs to be excluded from the investments for computing disallowable amount for the purpose of Rule 8D of the IT Rules 1962. This line of argument gets strength from the judgment of High Court of Karnataka, which was followed while deciding an appeal in Mumbai by the Tribunal in the case of India Advantage vide ITA NO 6711/M/2011, Dt 14.9.2012. Relevant portions read as follows.

"6. However, the Hon'ble High Court of Karnataka have recently considered the disallowance of expenses incurred on borrowings made for purchase of trading shares u/s 14A of the IT Act in the case of CCL Ltd vs. JCIT (supra). The assessee in that case was distributor of state lotteries and dealer in shares and securities. The assessee had taken loans for the purchase of certain shares and it has incurred expenditure for broking the loans which had been disallowed under Rule 8D by the AO and confirmed by the Ld CIT (A). the Tribunal agreed with the authorities below that the expenditure relatable to earning of dividend income though incidental to the trading in shares was also to be disallowed u/s 14A of the IT Act. The Tribunal however, had observed that the entire broking commission was not relatable to earning of dividend income as the loan had been utilized for the purchase of shares and the profit shown for the sale of shares had been offered as business income. The Tribunal, therefore, directed the AO to bifurcate the expenditure proportionately. The order of the Tribunal was however, not upheld by the Tribunal. The High Court noted that 63% of shares which were purchased were sold and income derived was offered to tax as business income. The remaining 30% of shares which remained unsold had reverted to dividend income for which the assessee had not incurred any

M/s. Urudavan Investment & Trading P. Ltd

expenditure at all. The High Court also observed that the assessee had not retained the shares with the intention of earning dividend income which was incidental due to his sale of shares which remained unsold by the assessee. The High Court, therefore, did not uphold the order of the Tribunal disallowing the expenditure in relation to the dividend from shares. Thus, there being a direct judgment of a Hon'ble High Court on this issue, the same has to be followed in preference to the decision of the Special Bench of the Tribunal in the case of M/s. Daga Capitl Management P. Ltd. (supra). In fact, we note that the Tribunal in the case of Ganjam Treading Co. Ltd. (supra) has already considered this situation and held that in view of the judgment of Hon'ble High Court of Karnataka in the case of CCL Ltd vs. JCIT (supra) the disallowance of interest in relation to the dividend received from trading shares cannot be made. We, therefore, see no infirmity in the order of the Ld CIT (A) in deleting the disallowance u/s 14A computed by the AO in relation to the stock-in-trade. The order of the Ld CIT (A) is accordingly upheld."

23. But the fact is that the ground 2 of the revenue is set aside for reconsideration and fresh adjudication by the assessing authority. We have given certain guidelines for deciding if the transactions in question are business transactions or otherwise. AO needs to collect additional facts for deciding the principle of *res judicata* and the rule of *consistency*. Relevant discussion is given in the preceding paragraphs of this order. Till the time, the actual nature of the transaction is decided; the quantification issues u/s 14A has to wait for sake of harmony in adjudication. Therefore, we are of the opinion, this ground of the assessee should be set aside to the files of the AO for the limited purpose of re-deciding the quantum of disallowance u/s 14A of the Act in the light of his likely finding as well as the decision referred or extracted above. Accordingly, the ground of the assessee's appeal is set aside.

24. In the result, the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on this 5th day of December, 2012.

Sd/-
(D.K. AGARWAL)
JUDICIAL MEMBER

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

Date : 5th December,2012

At :Mumbai
Okk

M/s. Urudavan Investment & Trading P. Ltd

Copy to :

- 1. The Appellant.*
- 2. The Respondent.*
- 3. The CIT (A), Concerned.*
- 4. The CIT concerned.*
- 5. The DR "F", Bench, ITAT, Mumbai.*
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By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai